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Supreme Court, U.S.
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In The Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Sixth Circuits

BRIEF OF INTERESTED HUMAN RIGHTS CLINICS AND ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Columbia Law School Human Rights Clinic (Columbia Clinic), to bridge theory and practice, provides students with hands-on experience working on active human rights cases and projects. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Columbia Clinic has worked on several matters concerning human rights issues in the United States.

Amicus Curiae the Allard K. Lowenstein International Human Rights Clinic (Yale Clinic) is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Yale Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Yale Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

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[1] The parties' letters consenting to the filing of *amici curiae* briefs have been filed with the Clerk of the Court. No counsel for any party has authored this brief in whole or part. No person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of the brief.

Amicus Curiae the International Human Rights Clinic at George Washington Law School (GW Clinic) is dedicated primarily to litigating human rights cases before United States and international tribunals. The GW Clinic seeks first to promote the progressive integration of international human rights standards into United States legal practice, and second, to assist victims of injustice in utilizing domestic and international legal regimes to protect their human rights or vindicate violations of those rights. Accordingly, its docket consists largely of cases either in United States courts under the Alien Tort Claims Act (ATCA) and other federal statutes, or before international tribunals, such as those in the Inter-American Human Rights System.

Amicus Curiae the International Human Rights Law Clinic at the University of Virginia School of Law (U.Va. Clinic) gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. Projects are designed to help students build the knowledge and skills necessary to be effective human rights lawyers and to integrate the theory and practice of human rights. The U.Va. Clinic collaborates with non-governmental organizations and individual advocates on a wide range of human rights issues through various means, including litigation. The U.Va. Clinic's work regularly involves comparative legal analyses and international law analyses of alleged human rights violations or domestic legislation.

Amicus Curiae Global Rights – Partners for Justice ("Global Rights") is a non-profit organization of human rights and legal professionals engaged in human rights advocacy, litigation, and training around the world. Founded in the District of Columbia in 1978, Global

Rights (formerly the International Human Rights Law Group) works to empower advocates to expand the scope of human rights protection for men and women and to promote broad participation in creating more effective human rights standards and procedures at the national, regional, and international level. Global Rights has represented individuals and organizations before United States and international tribunals and has appeared as *amicus curiae* in a number of United States cases. Beginning in the 1990s, a central focus of Global Rights' work has been to promote the use of international human rights law and standards in efforts to promote women's rights and to combat racial discrimination. Global Rights joins this brief to emphasize the obligation of the United States to provide remedies for racial and gender discrimination consistent with its obligations under international treaty law, particularly the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as international customary law.

Amicus Curiae the National Economic and Social Rights Initiative (NESRI) promotes a human rights vision for the United States that ensures dignity and access to the basic resources needed for human development and civic participation. The Human Right to Education Program at NESRI works with education advocates and organizers to promote policy change in public education using human rights standards and strategies. NESRI believes that human rights offer a framework for how to transform our public schools based on internationally recognized standards of equality, accountability, dignity, and community participation. The program initiatives work in collaboration with community partners to

generate human rights documentation, analysis, advocacy, public education materials and workshops.

Amicus Curiae the US Human Rights Network was formed to promote United States accountability to universal human rights standards by building linkages between organizations, as well as individuals, working on human rights issues in the United States. The Network strives towards building a human rights culture in the United States that puts those directly affected by human rights violations, with a special emphasis on grassroots organizations and social movements, in a central leadership role. The Network also works towards connecting the United States human rights movement with the broader United States social justice movement and human rights movements around the world. The Network joins this brief to emphasize the United States' obligation to remedy discrimination and promote equality and in recognition of the important role that integrated schools play in realizing the right to education.

SUMMARY OF ARGUMENT

Comparative and international law are relevant to the Court's consideration of the constitutionality of the managed-choice plans adopted by Jefferson County Board of Education and Seattle School District No. 1, and support upholding both plans. The legal tradition of the United States has long embraced looking to foreign and international precedent for guidance on domestic legal questions. The Court's intellectual leadership in the field of international human rights is strengthened by consideration of the human rights jurisprudence of foreign jurisdictions and the law of nations.

The courts of other nations as diverse as Canada, South Africa, and India and international entities such as the European Union have all confronted challenges to race-conscious and gender-conscious policies. These bodies repeatedly have upheld the use of such policies to benefit underrepresented minorities, and in many cases have permitted affirmative action programs that go far beyond the managed-choice programs at issue here. As members of this Court have previously recognized, opinions such as these by colleagues in foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

International treaties to which the United States is a party are also sources of guidance in consideration of the validity of the Jefferson County and Seattle plans. These international treaties not only permit but endorse the type of race-conscious programs voluntarily adopted by the Jefferson County and Seattle school districts.

ARGUMENT

I. COMPARATIVE AND INTERNATIONAL LAW ARE RELEVANT TO THE ISSUES BEFORE THE COURT

Respondents argue that the managed-choice plans adopted by Jefferson County and Seattle constitutionally use race as one of several factors in assigning students to public schools. The record amply supports these arguments.

In considering the constitutionality of the Jefferson County and Seattle plans, *amici curiae* urge this Court to look to foreign and international law to inform its decision

regarding the Jefferson County and Seattle managed-choice plans.

The Court has long recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations"); *see generally* Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M. Franck & Gregory H. Fox eds., 1996).

In addition, the Court has recognized that customary international law is a part of American law and should be looked to for guidance in determining issues that fall within its scope. *The Paquete Habana*, 175 U.S. 677, 700 (1900). This recognition of the importance of international law in guiding American jurisprudence is especially true in the area of human rights. The fundamental rights that are guaranteed by the Constitution of the United States have found iterations in the laws of other nations as well as in international treaties and covenants. In *Roper v. Simmons*, Justice Kennedy observed that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. 551, 578 (2005). The Court has expressly looked to the laws and opinions of other nations in determining issues pertaining

to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution, *Roper v. Simmons*, 543 U.S. at 575-78; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958), as well as issues pertaining to the fundamental rights of freedom and privacy, *see, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003), *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

There are practical as well as historic reasons to look to international law for guidance in resolving domestic legal issues. Experience has a longstanding role in the development and evolution of legal jurisprudence – as Justice Holmes wrote, "the life of the law has not been logic, it has been experience," Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). Looking to the experience of other legal systems for ideas and guidance is particularly practical when those other systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (1998); *see also New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J., concurring) (supporting the application of other nations' relevant experiences to determine scope of Fifth Amendment exclusionary rule); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that other countries draw from American constitutional theory and practice and that, as a result, the ways in which those countries have dealt with problems analogous to issues arising in American jurisprudence can be

very useful in analyzing and interpreting difficult American constitutional issues).

International and foreign law rulings on constitutional issues such as those facing the Court can also illustrate the ramifications of different solutions to similar legal problems, *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting), shedding light on potential consequences of a given constitutional interpretation or ruling.

Justice Ginsburg has repeatedly exhorted the value of legal decision-making processes that take into account the decisions and opinions of international law and foreign jurisdictions. *See, e.g.*, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Keynote Address to the American Society of International Law (Apr. 1, 2005). Justices Kennedy, Breyer, and Stevens have also demonstrated a belief that both comparative and international law materials are valuable aids to constitutional interpretation. *See, e.g., Roper*, 543 U.S. at 575 (Kennedy, J.) (noting that the Court's determination that the death penalty is disproportionate punishment for juvenile offenders "finds confirmation" in the fact that the United States was the only country in the world that officially sanctioned the practice), *Lawrence*, 539 U.S. at 576 (Kennedy, J.) (noting that the European Court of Human Rights and other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); *Atkins*, 536 U.S. at 316 n.21 (Stevens, J.); *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting from denial *of certiorari*) (citing an apparent international

consensus against the execution of a capital sentence imposed upon a juvenile to urge the Court to revisit the issue of the constitutionality of the sentence); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that other nations' approaches to campaign finance are consistent with Supreme Court majority's approach); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting from denial of *certiorari*) (considering the decisions of the European Court of Human Rights, the U.N. Human Rights Committee, and the case law of other countries in determining if a lengthy delay in administering the lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. at 976-77 (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and the European Union as aids to deciding question of United States federalism); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (looking to opinions of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to deciding questions arising under the Eighth Amendment). *See also* William Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future – A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (noting "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process").

Furthermore, recognizing the validity of interpretations from foreign and international courts ensures the Court's continued presence and leadership in the international arena of human rights issues. *See* Martha F. Davis,

International Human Rights and United States Law: Predictions of a Courtwatcher, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the twenty-first century, judicial legitimacy requires that courts acknowledge international context of decisions). Decisions rendered by this Court have long served as a model for countries around the world; high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998). Increased engagement with the constitutional courts of other countries can help to ensure a leading position in international human rights for American courts and for the United States more generally.

The practical and historic rationales for taking international and comparative perspectives into consideration in resolving domestic legal issues are directly relevant to determining the constitutionality of the Jefferson County and Seattle plans. The United States is not alone among nations in instituting programs promoting diversity and remedying lingering effects of discrimination against certain social groups, nor has the United States been alone in requiring that such programs be reconciled with guarantees of equality under existing law. Indeed, the legal systems in other countries have been profoundly influenced by the legacy of this Court's decision in *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955). *See* L'Heureux-Dubé, 34 Tulsa L.J. at 20 (noting that *Brown* has "had a large impact on the spirit and development of human rights protections worldwide"). *Brown* has been

widely cited by courts all over the world. *See, e.g., Canada (Attorney General) v. Moore*, 55 C.R.R. (2d) 254; 1988 C.R.R. LEXIS 287; *Summayyah Mohammed v. Moraine & Another* (1996), 3 L.R.C. 475 (Trinidad & Tobago); *Te Runanga O Muriwhenua Inc. v. Attorney-General* [1990] 2 N.Z.L.R. 641, 1990 N.Z.L.R. LEXIS 845 (C.A.) (New Zealand). Taking into account other nations' interpretations of human rights issues will only enhance the Court's reasoning, prestige and influence in the areas of international human rights law and constitutional law.

II. OTHER NATIONS HAVE UPHELD RACE-CONSCIOUS AND GENDER-CONSCIOUS MEASURES UNDER COMPARABLE CIRCUMSTANCES

Numerous countries have upheld the use of "special measures" – both race-conscious and gender-conscious factors – in programs to benefit underrepresented populations. In many countries, permissible programs to promote integration and remedy past discrimination are much more aggressive than the narrowly-tailored managed-choice programs at issue here, and even jurisdictions that have set limits on affirmative action have upheld race-conscious or gender-conscious measures.

Most notably, the Court of Justice of the European Communities has endorsed programs that use gender as a factor in employment decisions in order to remedy gender discrimination in employment. In two recent cases, the Court of Justice upheld national measures giving priority to women for promotion to public service positions in which women were underrepresented. *See* Case C-158/97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289 (E.C.J. 2000) (*available on* Westlaw); Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*,

1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw).

Significantly, in the Hessen, Germany plan under review in *Badeck* and the German national rule considered in *Marschall*, gender was used as a "plus" factor for promotion. *Cf. Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 318 (1978); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture – Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 279 (1999) (acknowledging that race and gender may be plus factors in employment, promotion, or educational admissions). The plans under review in *Badeck* and *Marschall* did not give automatic or unconditional priority to women over men. Similarly, the Jefferson County and the Seattle school integration plans under review in the case at bar do not give automatic or unconditional priority in school assignment to students of any race. Rather, in the Jefferson County program, students are initially assigned to schools in their "resides" area, the boundaries of which are drawn taking race into account, but that assignment may be superseded by student choice and other factors. In the Seattle program, race is but one of several factors that may be utilized, after consideration of the student's preference among schools to attend. Thus, student choice is the primary selection criteria under both plans.

Although in *Badeck* and *Marschall* the European Court of Justice did not explicitly adopt the concept of "narrow tailoring" from United States jurisprudence, it engaged in analysis similar to that invoked by American courts reviewing government action with regard to race-conscious programs. Thus, in *Badeck*, for example, the European Court investigated whether the priority given to

females in appointments and promotions pursued a legitimate social objective and used means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, 2000 E.C.R. at 1889. Applying this standard, the court concluded that the program passed muster under Community law. *Id.* at 1919.

Since *Badeck*, the European Court of Justice and the European Free Trade Association ("E.F.T.A.") Court have upheld affirmative measures to promote employment of underrepresented groups. In Case E-1/02, *EFTA Surveillance Authority v. The Kingdom of Norway*, [2003] IRLR 318 (E.F.T.A. 2003), the E.F.T.A. Court affirmed that states may adopt measures providing specific advantages for women in employment sectors in which they were previously underrepresented, so long as such measures take into account the principle of proportionality, "which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued." *Id.* at paras. 43, 56. Similarly, in Case C-476/99 *Lommers v. Minister van Landbouw Natuurbeheer en Visserij*, [2002] IRLR 430 (E.C.J. 2002), the European Court of Justice found that the Dutch Ministry's program reserving a limited number of subsidized places for female officials was proportional and compatible with the European Community Equal Treatment Directive 76/207 since it did "not totally exclude male officials from its scope" and promoted the employment of a previously underrepresented group.

Other countries also permit race-conscious and gender-conscious programs to correct systemic underrepresentation of minority populations.

The Canadian Charter of Rights and Freedoms, permits governmental programs to redress past discrimination, and its equal protection provision specifies that the Charter "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race." Can. Const. (Constitution Act, 1982) Schedule B, Pt. I (Canadian Charter of Rights and Freedoms), § 15(2); *see generally Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 Can. Sup. Ct. LEXIS 33, at *87-*100 (Can.) (discussing relationship between § 15(2) and Charter's equal protection provision).

In addition, the Canadian Human Rights Act of 1985 (R.S.C. 1985, c. H-6, s. 16) and Employment Insurance Act of 1996, Part II Employment Benefits and National Employment Service (S.C. 1996, c. 23, s. 60) both exclude from the definition of prohibited discrimination special programs "designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."

In interpreting the Canadian Human Rights Act, the Supreme Court of Canada upheld an affirmative action measure imposed on the Canadian National Railway to combat systemic discrimination in the hiring and promotion of women. *Canadian Nat'l Ry. Co. v. Canada*, [1987] 1 S.C.R. 1114, 1143-45, 1987 S.C.R. LEXIS 1136, at *48-*52 (Can.). The special, temporary measure – far more interventionist than the voluntary school integration programs at issue here – required hiring at least one woman for

every four positions traditionally filled by men until women had achieved greater representation. *Id.* at 1125-27, 1141, 1987 S.C.R. LEXIS at *17-*21, *44-*45.

Similarly, the South African Constitution adopted in 1996 specifically acknowledges the injustices of the past and promotes affirmative action policies to assist groups that have been disadvantaged under prior laws. S. Afr. Const. pmbl.; ch. 2, § 9(2). Indeed, the lack of quality education available to African students in South Africa led the dean of a medical school to create an affirmative action program targeted to benefit African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374 (Durban Sup. Ct.), 1995 SACLR LEXIS 256 at *16-*17 (S. Afr.). An Indian woman who was denied admission challenged the school's program. *Id.* at *13-*14. In rejecting her claim, the court observed that, although Indians also suffered discrimination under apartheid, the experience for Africans was significantly worse, and compensating for this long-standing mistreatment of African applicants to the medical school did not represent unfair discrimination against Indian students under the constitution. *Id.* at *28.

South African legislation also reflects a commitment to the adoption of polices to redress past educational discrimination and promote equality. In South Africa, the Schools Act 84 of 1996 (No. 27 of 1996), Section 34(1), requires equitable funding of public schools in order to ensure the "proper exercise" of the right to education and to redress past inequalities; the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (4 of 2000), Section 25, requires the state to take measures and implement programs to promote equality and where necessary or appropriate develop action plans to address unfair discrimination; and the Employment Equity Act

(No. 55 of 1998), Sections 6(2)(a) and 15(3), states that it is not unfair discrimination to "take affirmative action measures consistent with the purposes of this Act" if such measures "include preferential treatment and numerical goals, but exclude quotas."

In India, the Indian Constitution of 1950 and its subsequent amendments set forth a comprehensive equality doctrine that has laid the foundation for extensive affirmative action measures through a system of quotas (referred to as "reservations") in the areas of higher education and participation in government employment to remedy past injustices against members of the lower levels of India's caste system as well as other historically-disadvantaged groups. The Constitution reserves seats for members of India's most disadvantaged social castes and tribes (known in Ugal parlance as "scheduled castes" and "scheduled tribes") in the House of the People, state legislative assemblies, and local governmental units (Indian Const. Arts. 243D, 243T, 330, 332) and permits the government to "reserve" civic "appointments or posts" for members of "any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State" (Indian Const. Art. 16(4)) and make "promotion[s], with consequential seniority," of members of historically underrepresented castes and tribes to governmental positions. (Indian Const. Art. 16(4A)).

In response to a legal challenge to affirmative action over a half century ago in *State of Madras v. Champakam Dorairajan*, A.I.R. (S.C.) 226 (1951), India amended its Constitution in 1951 to affirm its commitment to affirmative action: "Nothing in [the constitution's anti-discrimination provisions] shall prevent the State from

making any special provision for the advancement of any socially and educationally backward classes of citizens or for the [lowest castes and tribes]." (Indian Const. Art. 15(4); *see also* Indian Const. Art. 29).

Since 1963, the Indian Supreme Court has consistently upheld the constitutionality of affirmative action programs in the higher education and governmental employment contexts, including the endorsement of a quota system that allows up to fifty percent of positions to be reserved for members of historically disadvantaged groups, going far beyond the ameliorative measures voluntarily adopted by Jefferson County and Seattle. (*See Balaji v. State of Mysore*, A.I.R. (S.C.) 649 (1963); *see also Devadasan v. Union of India*, A.I.R. (S.C.) 179 (1964) (affirming *Balaji* fifty percent ceiling in context of carrying forward unfilled reserved positions in government employment); *Indra Sawhney v. Union of India*, A.I.R. (S.C.) 477 (1993)).

In addition to the countries discussed above, many other nations also take into account the need to redress the effects of past discriminatory laws and practices. In New Zealand and Australia, for example, affirmative action programs are permitted by statute. *See* New Zealand Bill of Rights Act 1990, § 19, 1990 S.N.Z. No. 109; Human Rights Act 1993, 1993 S.N.Z. No. 82 §§ 58, 73(1) (New Zealand); Racial Discrimination Act 1975, § 8(1) (Austl.); *see also Gerhardy v. Brown* (1985) 159 C.L.R. 70 (Austl.). In Northern Ireland, past religious discrimination is addressed through legislation that requires taking religion into account in order to promote a more integrated police force. Specifically, the Police (Northern Ireland) Act 2000, c.32, § 46(1) requires that in recruitment or appointment of trainees, appointments shall be made from

a pool of qualified applicants of whom "one half shall be persons who are treated as Roman Catholic." *Re Parsons: Application for Judicial Review*, [2003] NICA 20; [2004] NI 38 (N. Ir.) (affirmative action in police recruitment did not violate applicant's right to freedom of religion). *See also Committee on the Elimination of Racial Discrimination: Addendum by Israel*, at ¶¶ 485, 486 U.N. Doc. CERD/C/471/Add. 2 (2005) (describing recent Israeli educational programs to redress past marginalization of Arabs and to "lower[] the walls that separate [Arab and Jewish] societies," so that Arabs can "achieve success in higher educational institutions and reach full integration in the public daily life and economy of the country"); Herbert M. Jauch, *Affirmative Action in Namibia* 53-148 (1998) (detailing history of affirmative action in Namibia).

This Court has recently reaffirmed the relevance of international legal norms to its proceedings: "The opinion of the world, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (Kennedy, J.). Accordingly, the legal analyses applied by other countries to uphold successful affirmative action and other race- and gender-conscious policies for groups, like racial minorities in the United States, that have suffered past discrimination should inform this Court as it addresses similar issues, including the voluntary efforts made by public school districts in the United States to promote the racial integration of their schools for articulated benefits to all students and their communities.

III. INTERNATIONAL TREATIES SUPPORT CONSIDERATION OF RACE AS A FACTOR IN SCHOOL ASSIGNMENT

Widely ratified international human rights treaties also represent the cumulative wisdom and experience of nations across the globe. Two treaties are of particular relevance here – the International Covenant on Civil and Political Rights[2] (hereinafter "ICCPR," which has been ratified by 157 nations) and the International Convention on the Elimination of All Forms of Racial Discrimination[3] (hereinafter "CERD," which has been ratified by 170 nations). Together these treaties, both of which have been ratified by the United States, and are the supreme law of the land, represent the international consensus on what constitutes racial discrimination. As such, they provide guidance as courts examine local authorities' remedial efforts to provide equal access to our nation's education system.[4]

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[2] *Adopted and opened for signature* December 16, 1966, 999 U.N.T.S. 171.

[3] *Adopted and opened for signature* December 21, 1965, 660 U.N.T.S. 195.

[4] As stated in the Supremacy Clause, "all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. *See also* Restatement (Third) of Foreign Relations Law § 115(b) Reporter's Note (1987) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").

A. The ICCPR and CERD Make Clear that Race-Conscious Policies Designed to Create Diversity Are Not Discriminatory

Both the ICCPR and CERD require parties to the covenants to abstain from engaging in "racial discrimination." The ICCPR guarantees rights without distinction based on race, ICCPR art. 2(1), 999 U.N.T.S. 173, and CERD prohibits conduct that would have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," CERD, art. 1, 660 U.N.T.S. at 216. *See* ICCPR, art. 26, 999 U.N.T.S. at 179. The CERD also states that parties to the treaty, "condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction," CERD art. 3, 660 U.N.T.S. at 218, and "undertake . . . to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . in the enjoyment of . . . [the] right to education and training" CERD art. 5(e)(5), 660 U.N.T.S. at 222. *See* Convention on the Elimination of All Forms of Racial Discrimination, Gen. Rec. No. 19, *Racial segregation and apartheid*, paras. 2-4, U.N. CERD Comm., 47th Sess., U.N. Doc. A/50/18 (Aug. 8, 1995). Finally, the CERD's general provisions prohibit all forms of racial discrimination, *see* CERD, arts. 2-5, 660 U.N.T.S. at 216-22. Thus, the treaties provide comprehensive protection against discrimination.

Yet, the Human Rights Committee, which is the formal monitoring body for the ICCPR,[5] has noted that

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[5] As a means for regulating compliance with the treaty, the terms of the ICCPR set up a Human Rights Committee (the "Committee").

(Continued on following page)

"not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and ***if the aim is to achieve a purpose which is legitimate under the Covenant.***" [emphasis added] United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18, para. 13, at 28 (1994) (hereinafter "General Comment 18"). According to the Human Rights Committee:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . .

General Comment 18, para. 10.

Similarly, the CERD specifically states that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that

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Parties to the ICCPR submit reports to the Committee on the measures adopted pursuant to the treaty. ICCPR, art. 40, 999 U.N.T.S. at 181-82. Following a review of the reports, the Committee issues concluding observations that often include recommendations for addressing concerns raised by the Committee.

> they shall not be continued after the objectives for which they were taken have been achieved.

CERD, art. 1(4), 660 U.N.T.S. at 216; *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (stating that the CERD endorses "special and concrete measures" to ensure the rights outlined in the CERD, until such objectives have been achieved).

When the Senate ratified the CERD, it recognized that race may be taken into account when necessary to secure equality. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper, the Legal Adviser to the Secretary of State, noted: "Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection." Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 721, 722 (1994).

The managed-choice programs at issue here are clearly both reasonable and objective; they are carefully designed to limit the use of race in school assignment to the extent necessary to achieve the goal of school integration, and they do not permit exercise of informal discretion that might mask discriminatory bias. More importantly, the programs are well designed to achieve the central purpose of the covenants, which is to prevent discrimination. They do not in any way lead to the "maintenance of separate rights for different racial groups." *See* CERD, art. 1(4), 660 U.N.T.S. at 216. They represent the most modest of race conscious' remedies, and they stop far short of providing special preferences or benefits to one racial

group. The program benefits all students and, indeed, the entire community, by creating non-discriminatory and diverse school environments. Indeed, the Jefferson County and Seattle school districts have continually and repeatedly determined that integrated educational environments lead to people of all racial backgrounds leading richer lives. The Jefferson County Board of Education has explained that one of its educational goals is to ensure that all students in the district are, "safe, supported, respected and confident in racially integrated schools, classrooms and student activities." Joint Appendix 22.

B. The Managed-Choice Programs Are Consistent with the Obligations of the United States Under the ICCPR and CERD

Upon ratification of the ICCPR and CERD, the Senate acknowledged that it is the responsibility of both our state and local governments to ensure the principles set forth in these treaties.[6] It is also the expectation of the international community. For example, parties to the ICCPR are obligated to undertake the "necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized" in the treaty. ICCPR, art. 2(2), 999 U.N.T.S. at 173. Likewise, Article 2(1)(a) of the CERD provides that "[e]ach State Party undertakes . . . to ensure that all public authorities and public institutions, national and local, shall act in conformity" with their

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[6] U.S. Reservations, Understandings, Declarations, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992), II(5); *see also* U.S. Reservations, Understanding, Declarations, and Proviso, CERD, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994), II.

obligations under the treaty. CERD, art. 2, 660 U.N.T.S. at 218. The programs at issue in the instant case, which do not even involve preferential treatment, are appropriate local measures to realize the principle of non-discrimination.

Indeed, the Human Rights Committee recently addressed the issue of de facto racial segregation in United States public schools.[7] The Committee noted that de facto racial segregation had resulted from housing patterns and the manner in which school districts are created, funded and regulated. It expressed concern that the United States "had not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students." *Id.* at ¶ 23. The Committee reminded the United States "of its obligation under articles 2 and 26 of the [ICCPR] to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis." Finally, the Committee recommended that "[t]he [United States] should conduct in-depth investigations into the de facto segregation described above, and take remedial steps, in consultation with the affected communities." *Id.* The steps taken by the Seattle and Jefferson County school districts are precisely the type of measured remedial actions called for by the Committee, and by the ICCPR, in response to de facto segregation.

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[7] Human Rights Committee, *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3 (2006).

Carefully crafted managed-choice programs tailored to ensure equal enjoyment of rights by all racial groups are thus permissible and even endorsed under the ICCPR and CERD.

C. Self-Execution Is Not an Issue Where, as Here, the Treaty Provisions Are Cited as Aids to Interpretation

When the United States ratified the ICCPR and CERD, it included reservations that many, but not all, of the articles are "non-self-executing." Louis Henkin *et al.*, *Human Rights* 784-86, 1043-44 (1999). A non-self-executing treaty requires additional legislation in order for it to be enforceable by a litigant in Court. While the Human Rights Committee has questioned the validity of such reservations in connection with a human rights treaty (*see* ICCPR, *General Comment Adopted Under Article 40 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant* (Adopted, November 2, 1994), 34 I.L.M. 839 (1995) (General Comment 24)), the propriety of such reservations need not be resolved here. The *amici* cite the provisions of the ICCPR and CERD not as the foundation for their legal claims, but rather as interpretive support for their position that the school districts' managed-choice programs do not violate the United States Constitution.

As explained in detail above, this Court has looked to international law to provide guidance in various areas of jurisprudence. Even where treaties are viewed as "non-self-executing," they may be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, or – as here – to support race-conscious

managed-choice school integration policies. *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* 62-64, 68, 97-98, 134-35, 370, 377-78 n.4, 384 (1996); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 456 n.206, 460, 467-68, 470 (1997); Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 Am. Soc'y Int'l L. Proc. 259, 262, 264 (1996). In an effort to best understand the need for these programs, their benefits to our communities, and their narrow limits in application, the Court may appropriately consider these treaties here.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the briefs of Respondents, the decisions of the courts below should be affirmed.

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